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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 596

THE SISSETON AND WAHPETON BANDS OF SIOUX INDIAN, Appellants

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

MOTION TO DISMISS

The Solicitor General, on behalf of the United States, moves that this appeal be dismissed.

The ground of the motion is that the method provided by law for reviewing the judgment of the Court of Claims in this case is by writ of certiorari, petition for which has heretofore been filed and denied.

STATEMENT

The Jurisdictional Act under which the Court of Claims took jurisdiction of this case was the Act of April 11, 1916 (c. 63, 39 Stat. 47), which provided:

> That all claims of whatsoever nature which the Sisseton and Wahpeton bands of

> Sioux Indians may have or claim to have against the United States shall be submitted to the Court of Claims, with the right to appeal to the Supreme Court of the United States by either party * * *.

On April 23, 1923, judgment was entered in the Court of Claims in favor of the United States. (R. 63.) On December 24, 1923, these appellants filed in the Court of Claims an application for appeal to this Court, which was denied because not filed within the time prescribed by Section 243 of the Judicial Code. (R. 64.) Thereafter, by an Act of Congress approved March 4, 1927, c. 522, 44 Stat. 1847, it was provided:

> That the plaintiffs or complainants in suit numbered 33731 in the Court of Claims of the United States be, and they are hereby, granted one year within which to appeal from any or all orders, judgments, or decrees rendered against them in the trial of said action heretofore had: *Provided*, That the time within which said appeal may be taken shall begin to run with the date of the approval of this Act.

That Act related to this case. It was passed after the effective date of the Act of February 13, 1925, which abolished appeals from the Court of Claims and provided for review of its judgments by certiorari.

Thereupon, on May 21, 1927, these appellants filed in this Court their petition for certiorari to review the judgment of the Court of Claims

which had been entered April 23, 1923. Their petition proceeded on the theory that the purpose of the Act of March 4, 1927, was to enlarge the time for taking the case to this Court, but not to change the method prescribed by the Act of February 13, 1925. In their supporting brief these appellants, then petitioners, said:

> In proceeding by certiorari rather than by appeal we assume that the term "appeal," as used in the Act of March 4th, is not limited to its technical use, but that the term was employed to cover any method of bringing the case before this Court for review which would be in harmony with the statutes and with the rules of this Court pertaining to petitions for and writs of certiorari to the Court of Claims. Subd. *b* and *c*, Sec. 3, Act February 13, 1925. (Page 3, Petitioners' brief, No. 261, October Term, 1927.)

The brief in opposition for the United States filed in September, 1927, made the same assumption and dealt with the case as if certiorari were the proper method of review.

The petition for certiorari was denied October 10, 1927. (*The Sisseton and Wahpeton Bands of Sioux Indians, Petitioners* v. *The United States*, No. 261, October Term, 1927.)

Meanwhile, on May 21, 1927, these appellants filed in the Court of Claims an application for appeal, which was allowed on June 6, 1927. (R. 65.) On October 28, 1927, after having applied for and

been denied certiorari, these appellants docketed their appeal in this Court.

ARGUMENT

During the period when the law provided for appeals to this Court from judgments of the Court of Claims it was the practice of Congress in enacting special jurisdictional Acts, granting jurisdiction to the Court of Claims, to insert the clause:

> with the right of appeal to the Supreme Court as in other cases.

Notwithstanding the passage of the Act of February 13, 1925, abolishing appeals from the Court of Claims and providing for review of its judgments by certiorari, special jurisdictional Acts have been passed by Congress containing the same phrase. The following is a list of these Acts, together with the wording of the pertinent provisions:

Act of March 3, 1925 (c. 459, 43 Stat. 1133), Kansas or Kaw Indians:

> From the decision of the Court of Claims * * * an appeal may be taken by either party as in other cases to the Supreme Court of the United States.

Act of May 14, 1926 (c. 300, 44 Stat. 555), Chippewas of Minnesota:

> With right of appeal to the Supreme Court of the United States by either party as in other cases.

Act of July 2, 1926 (c. 724, 44 Stat. 801), Citizen Band of Pottawatomies:

> With the right of appeal to the Supreme Court of the United States by either party as in other cases.

Act of July 3, 1926 (c. 734, 44 Stat. 807), Crow Indians:

> With right of appeal to the Supreme Court of the United States by either party.

Act of March 2, 1927 (c. 250, 44 Stat. 1263), Assiniboin Indians:

> With right of appeal to the Supreme Court of the United States by either party.

Act of March 3, 1927 (c. 302, 44 Stat. 1349), Shoshone Indians:

> With right of appeal to the Supreme Court of the United States by either party.

We find no other special jurisdictional Acts enacted since the passage of the Act of February 13, 1925. It is evident that Congress, through force of habit, has continued to use the expression "with right of appeal to the Supreme Court of the United States as in other cases."

It is not reasonable to suppose that Congress, after passing the Act of February 13, 1925, for the purpose of relieving this Court of the burden of hearing appeals from the Court of Claims regardless of the character of the questions involved or the merits of the appeals, recanted and intended to allow all these Indian cases covered by these special jurisdictional Acts to be taken to this Court

as a matter of right. There is nothing about the nature of the cases which would justify it, and the claimants are adequately protected by the right common to all litigants in the Court of Claims to apply to this Court for certiorari. We think all of these jurisdictional Acts should be construed to use the word "appeal" in a broad or popular sense, and to allow review by this Court only by the method common to litigants "in other cases."

The present case has some special features. It may be argued, because of the peculiar nature of the legislation affecting this case, that Congress intended by the Act of March 4, 1927, to revive the right of appeal which had formerly existed, and that it clearly was not the intention by the Act of March 4, 1927, to deal with this case exactly as with other litigation in the Court of Claims, because that Act grants a year from its passage within which to take steps for review by this Court, while the Act of February 13, 1925, limits the time for filing petitions for certiorari to three months. Notwithstanding this situation, we believe that the Act of March 4, 1927, should be construed merely to enlarge the time for seeking review in this Court and not to provide the old method of appeal. Such a construction works no hardship on these appellants, unless the Court denied their petition for certiorari on the ground that appeal was the proper method of review.

Their petition for certiorari seems to have been considered by the Court on the assumption that

review by certiorari was permitted. They have had their day in court and, after what has occurred, it is straining matters to force this Court to consider this case on appeal.

The question here presented has so far arisen only in this case. In none of the cases under the other special jurisdiction Acts above listed, enacted since February 13, 1925, has a judgment been entered and none of the claimants has yet been led to rely on a supposed right of appeal.

If the word "appeal," as used in the Act of March 4, 1927, applicable to this case, is to be given a broad rather than a technical meaning and construed to relate to the method of review prescribed by the Act of February 13, 1925, it will follow, of course, that all the other jurisdictional Acts above listed should be so construed; but if in the present case it is held that the method of review is by appeal and not by writ of certiorari, it may be desirable for the Department of Justice to call the situation to the attention of Congress with a view to legislation affecting the other cases.

Respectfully submitted.

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JANUARY, 1928.